

### **REMARKS**

Claims 1-23 and 35-49 are pending. Applicants gratefully acknowledge the Examiner's withdrawal of the previous rejections based on 35 U.S.C. §§ 112 and 103. In the Office Action mailed on November 25, 2008, the Patent Office rejected claim 16 under 35 U.S.C. § 112, second paragraph; and claims 1-23 and 35-49 under 35 U.S.C. § 103(a) over various combinations of Roskam et al. (US 2003/0044488 A1), Lenchin et al (US 4,510,166), Fennema ed. (Food Chemistry 3<sup>rd</sup> Ed.), Lazard et al (EP 0547551 A1), Tsen et al (US 3,773,521), and Baur et al (WO 94/21143). Applicants respectfully request reconsideration of the present application in light of the enclosed amendments to the claims and the following remarks.

#### **Indefiniteness rejection under 35 U.S.C. § 112, second paragraph**

The Patent Office rejected claim 16 as indefinite. Applicants have amended claim 16 to recite that the "pastry product" has a slurry pickup of from about 5% to about 30% of the slurry on the pastry product after coating. Accordingly, Applicants respectfully submit that amended claim 16 is not indefinite.

#### **Obviousness rejections under 35 U.S.C. § 103(a)**

##### **a. The Roskam et al reference**

The Office Action indicates that Roskam et al. (US 2003/0044488 A1) qualifies for §103(a) as a §102(a) reference. More specifically, the Office Action states that the provisional application 60/417,295 does not disclose several features presented in the instant claims (Office Action, p. 4). However, without admitting whether the provisional application supports the features of the present claims, Applicants concurrently submit a Declaration Under 37 C.F.R. § 1.131 indicating that present invention antedates the Roskam et al reference. The documents attached to the Declaration Under 37 C.F.R. § 1.131 show a Formula 72201-07 used in Experiment 11 and the results of this experiment.

The Office Action rejected several claims using Roskam et al as the primary reference under §103(a). Specifically, the Office Action rejected claims 1-23, 35-38, 41, and 43-48 as

being unpatentable over Roskam et al in view of Lenchin et al (US 4,510,166); and claims 39, 40, 42, and 49 as being unpatentable over Roskam et al in view of Lenchin et al, and further in view of Fennema ed. (Food Chemistry, 3<sup>rd</sup> Ed.) (Office Action, pp. 4-6). Because Applicants have antedated the Roskam et al reference, Applicants respectfully submit that the reference is not properly considered a 102(a) reference in this case and the rejections based on this reference should be withdrawn.

**b. Lazard et al in view of Tsen et al or Lazard in view of Tsen and other references**

The Office Action next rejected claims 1-11, 14-20, 22, 23, and 43-46 under 35 U.S.C. §103(a) as being unpatentable over Lazard et al (EP 0547551 A1) in view of Tsen et al (US 3,773,521). The presently pending claims have been amended to require from 49.31% by weight (See Example 2 of the present application) to about 100% by weight starch component (claims 1 and 17) or from 49.31% by weight to about 60% by weight wheat starch (independent claim 35). Lazard et al. (the '551 application) does not disclose or suggest such compositions. The highest amount of starch disclosed in the '551 patent application that Applicants have been able to locate is 45% and the highest amount of starch for a moisture barrier films is 35% starch (see page 4). Moreover, the Examples show, for example in Table III, the use of 6% converted corn starch and incorporates Table VI, which says that the remaining 30% of the composition of Table III contains from 8.5- 24.5% starch. Accordingly, even assuming that one quarter of the remaining 30% is starch (7.5% of the total composition) the examples instruct about 13.5% starch, significantly less than the presently claimed amount and well below the described upper limits for the compositions of the '551 patent.

Additionally, the '551 application specifically notes at the outset that "[a] typical film is prepared from approximately equal parts of each component" ('551 application at page 3 lines 2-3) (emphasis added) and further states that the composition is "an edible film comprising a balanced blend of starch, gelatin, plasticizer, lipid and water." ('551 application at page 2 lines 56-57) (emphasis added). To raise the starch level to the claimed level would be counter to the '551 application's specific instructions indicating a preference for keeping all components in approximately equal amounts. Accordingly, Applicants submit that the presently pending

claims would not have been obvious in light of the '551 application in view of Tsen.

With respect to claim 2, Applicants respectfully submit that the Examiner's contention that the '551 application discloses an invisible coating is not correct. The coatings of the '551 application would be glossy and visible due to their incorporation of gelatin, water, and fat (lipids). The '551 application itself admits that the coatings are glossy stating specifically that "[t]hese films are characterized by ease of use, ... glossy, non-tacky surface characteristics..." (the '551 application at page 3 lines 2-5). As one knows from looking at gelatin-based products such as Jello®, the surface of such products are glossy and therefore visible to the consumer.

Additionally, the presently claimed invention are dried coatings on the pastry product whereas the coating composition of the '551 application require water. The '551 application, in fact, specifically states, "[w]ater is necessary in the film to provide flexibility and to hydrate the starch and gelatin and fully develop the characteristics of these components in the edible film." ('551 application at p. 3, lines 35-36) (emphasis added). Accordingly, all of the presently pending claims overcome the present rejections based upon Lazard for at least this reason as well.

**c. Lazard et al in view of Tsen et al and Lenchin et al**

The Office Action rejected claims 12, 13, 21, and 47 under 35 U.S.C. §103(a) as being unpatentable over Lazard et al (EP 0547551 A1) in view of Tsen et al (US 3,773,521), and further in view of Lenchin et al (US 4,510,166).

The Examiner further adds Lenchin (US Patent No. 4,510,166) to the rejection to reject claims limited to a certain viscosity. Significantly, Applicants respectfully submit that none of the cited references disclose or suggest the viscosity claimed. Instead, the Examiner states that it would have been obvious to include dextrin at a specific solubility level depending on the desired gel strength and texture as taught by Lenchin. Applicants respectfully submit that this rejection, like the rejection based upon the selection of the starch, presupposes that one of ordinary skill knows what gel strength and viscosity are desired in order to select which compounds. The desired viscosity would have to be gleaned from Applicants' own

application, which is impermissible. This is not a matter of routine determination as suggested by the Examiner as there is no suggestion as to the effect of a change in the solubility level of the corn dextrin would have in a clear coating composition based upon a reference, Lenchin, which deals with the use of starch compounds as replacements for oil and fat in foodstuffs and condiments. There is no oil or fat in the coating compositions of the present invention such that there is no motivation, based upon the reference, to substitute the converted starches of Lenchin into the presently claimed invention.

**d. Lazard et al in view of Tsen et al and Baur et al**

The Office Action rejected claims 35-38, 41, and 48 under 35 U.S.C. §103(a) as being unpatentable over Lazard et al (EP 0547551 A1) in view of the combination of Tsen et al (US 3,773,521) and Baur et al (WO 94/21143). As Applicants understand the rejection, the Examiner has rejected various claims directed toward the use of higher amounts of starch and the use of a modified oxidized wheat starch in the coating composition based upon the above combination.

As noted above, the '551 application does not disclose the claimed amount of starch in the presently pending claims. Additionally, contrary to the Examiner's assertion the '551 would not have been modified in the manner suggested to increase the amount of starch depending on the textural properties desired in the coating as taught by Baur. One would not have been so motivated for at least two reasons. First, as discussed above regarding Lazard, Applicants have been unable to locate any reference in Lazard disclosing the use of more than 45% and, in the case of moisture barrier compositions, the reference suggests the 35% as the maximum. Moreover, the reference teaches that the components are to be used in "approximately equal parts" and "the unique properties of these films are obtained as a result of the balance between these components." Why would one be motivated to adjust the amounts of these components to the claimed ranges when the reference teaches away from such a modification that would unbalance the amounts of the various components? One of ordinary skill would not have been motivated to do so as this runs directly counter to the teaching of the '551 application.

Second, one of ordinary skill would not have been motivated to modify the coating composition of Lazard in view of Baur in the manner suggested by the Examiner because a) the '143 reference does not specifically disclose that the glaze can be applied to a pastry product and b) the coating would not successfully adhere. A review of the specification of the '143 reference shows that wheat flour is included as the first essential component of the glaze composition.<sup>1</sup> Accordingly, Applicants respectfully submit that the reference must be taken for its entire teaching. One of ordinary skill, supposing he/she would have even been motivated by Baur to modify the '551 application as suggested by the Examiner, would have also added wheat flour to the composition as taught by Baur. The wheat flour is an essential component of the Baur composition. As stated in the Declaration of John Stevens, the wheat flour component of the composition prevents the successful adherence of the coating to a wheat-based dough substrate, such as a pastry product. (Decl. of Stevens, ¶ 9). Wheat flour-containing coatings, such as those described in the '143 reference, may form a substantially clear coating on a french fry, but do not necessarily do so on other substrates. In fact, wheat flour containing coatings, when applied to a wheat-based dough substrate, create a flaky, raised, and visible coating, i.e. not a substantially clear coating. (Decl. of Stevens, ¶ 10).

Furthermore, Applicants respectfully submit that the '143 reference teaches away from the presently claimed products and certainly teaches one of ordinary skill away from the removal of wheat flour as a component of the glaze since, as discussed above, it unequivocally discloses that the wheat flour is essential to the composition. Accordingly, for at least the aforementioned reasons, there would not have been a motivation to combine the '143 coating to the '132 pastry product to obtain the claimed invention and, even if combined the combination will not yield the presently claimed invention. Applicants respectfully apply these same arguments to all of the Examiner's rejections regarding the combinations based

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<sup>1</sup>The Baur et al. reference discloses wheat flour as the first component of the composition. (Baur, p. 2, lines 27-28). The next paragraph states that a combination of modified starch is the "next essential component." (Baur, p. 3, lines 1-4). It logically follows that wheat flour is the first essential component of the composition since the modified starch combination is disclosed as the "next essential component" and the wheat flour is the only component listed before the starch.

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upon the '132 patent and the '143 reference.

**Double Patenting rejection**

Finally, as discussed in the previous Office Action, where a provisional obviousness type double patenting rejection is all that remains, the Examiner should withdraw the rejection and permit the present application to issue without a terminal disclaimer (see §804 of the M.P.E.P.).

Applicants respectfully submit that Applicants have made an effort to place the present application in condition for allowance, and a notice to this effect is earnestly solicited. In the event there are any remaining formalities or other issues needing Applicants' assistance, Applicants request the Examiner to call the undersigned attorney.


Respectfully submitted,

CHERE L. B. STEVENS, et al.

By: Price, Heneveld, Cooper,  
DeWitt & Litton, LLP

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Date

DHS:TAV:alw:jbs

  
Todd A. Van Thomme  
Registration No. 44 285  
695 Kenmoor S.E.  
P.O. Box 2567  
Grand Rapids, MI 49501  
Phone: (616) 949-9610  
Facsimile: (616) 957-8196